UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 24

QUALITY HEALTH SERVICES OF P.R., INC.d/b/a HOSPITAL SAN CRISTOBAL

Respondent

And

UNIDAD LABORAL DE ENFERMERAS Y EMPLEADOS DE LA SALUD

Charging Party

CASE NUM. 24-CA-11782

24-CA-11884

ALJ: Geoffrey Carter, Esq.

MEMORANDUM OF LAW TO THE EXCEPTIONS OF THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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TABLE OF CONTENTS

<u>MATTER</u>	<u>PAGE</u>
1- First Exception	. 2 to 16
A- The Union's top officers previous statements that the subcontracting was not going to be accepted.	. 5 to 9
B- Other Evidence Not Considered by the ALJ	9 to 13
2- Second Exception	. 16 to18
3- Third Exception	. 18 to 21
4- Fourth Exception	. 21 to 34
4-A: Specific Exception	. 31 to 34
5- Fifth Exception	. 34 to 37
6- Sixth Exception	. 37 to 39
7- Seventh Exception	. 39 -40
8- Eight Exception	. 40 to 42
9- Ninth Exception	42 -43
10- Conclusion	. 43 to 45
11- Certificate of Service	47
12- Attachments (enclosed in the paper copy)	
A- G.C. 2-A	
B- Joint Exh. 52-A	

TABLE OF AUTHORITIES

Supreme Court

1- Charles D. Bonano Linen Service v. NLRB, 454 U.S. 404, 412 (1982)
2- NLRB v. Gissel Packing Co., 395 U.S. 575 (1969) 19
Courts of Appeals
1- <i>NLRB v. Blevins Popcorn</i> , 659 F. 2 nd 1173, 1187 (D.C. Cir. 1981)
2- Pan v. González, 489 F. 3 rd 30 (1 st Cir.)
3- Peñasquitos Village v. NLRB, 565 F 2 nd 1074 23, 27
National Labor Relations Board
1- Automated Business Machines, 285 NLRB 1122 41
2- Cotter & Co., 331 NLRB 94
3- Daikichi Corp, 335 NLRB 53 (2001)
4- Double D Construction Group, 339 NLRB 303 22, 23, 27, 29, 31
5- Gold Standard Enterprises, 234 NLRB 618 24
6- Larsdale, Inc., 310 NLRB 1317 17
7- Martin Luther King, Sr. Nursing Ctr., 231 NLRB 15 42
8- Roosevelt Memorial Medical Center, 348 NLRB 1016 22, 41
9- Taft Broadcasting Co., 163 NLRB 475 at 478 (1967) 17
10- Shen Automotive Dealership Group, 321 NLRB 586 22, 23, 24,
11- Standard Dry Wall, Inc., 91 NLRB 103 (1950) 24
12- Westinghouse Electric Corp. 150 NLRB 1574 34, 37

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A.L.J. Mr. Geoffrey Carter, Esq.

MEMORANDUM OF LAW IN SUPPORT TO THE EXCEPTIONS OF THE ADMINISTRATIVE LAW JUDGE DECISION

COMES NOW, the Hospital San Cristobal de Ponce (hereafter to be referred as "the charged party", "the Hospital", "Respondent" or "the employer") through the undersigned attorney and respectfully states and avers.

According to N.L.R.B. Rules and Regulations, a party interested in filing exceptions to an Administrative Law Judge decision has within 28 days or within such further period as the Board may allow to file these exceptions under Section 102.46. In the case at bar the date to file exceptions is due on or before **March 1, 2012**.

FIRST EXCEPTION

The Administrative Law Judge (ALJ) determined that Respondent terminated the employees of the Dept. of Respiratory Care when there was no good faith impasse between the parties. See: Decision & Order at page 20, second paragraph.

Respondent's Base for the Exception

1- There was an impasse when Respondent decided to terminate the employment of the employees of the Respiratory Care Dept. in the afternoon of June 8th, 2011. As General Counsel (GC) witness Ariel Echevarría acknowledged "the final position (of the hospital) had been stated by them since the afternoon" (of July 8th), see: Tr. at page 281, L. 10-12). In addition, the ALJ also failed to consider documentation admitted in evidence that proved that the principal top union officers—directly and unequivocally stated during—the subcontracting negotiations they were not going to accept or compromise to allow a subcontracting.

In the case at bar the ALJ omitted to consider that the Human Resources Director (Candie Rodríguez) clearly and unequivocally had informed the Union in her July 6th 2011 letter that the **final deadline** to reach an agreement for concessions from the Union or to proceed with the subcontracting was <u>July 8th</u>, <u>2011</u>. As **Jt. Exh. 43-B** Page **2** of **50**

demonstrates on July 6^{th.} 2011 Miss Candie Rodríguez informed in writing to the Union that... "we all agreed to meet next Friday, **July 8** at 10:00 a.m. with the purpose of <u>finally</u> reaching agreements and **put an end** to the negotiation regarding the Dept. of Respiratory Care". The previously quoted sentence is unambiguously direct and clear: the Hospital was informing the Union that the July 8th meeting purpose was to finish off or "put an end" to the subcontracting negotiations and try to reach an agreement. Accordingly, the Union had been duly informed over a deadline to finish the negotiations and look for agreement.

2- This deadline was declared and informed timely to the Union because the parties had been negotiating for several months and it was clear from this communication that this was going to be the last time or effort of the hospital to look for an agreement. Respondent acted in good faith by warning the Union that it could not continue delaying the decision to either subcontract or obtain concessions from the union in order to curtail operational costs.

3- The ALJ acknowledges at page five of his Decision and Order¹, footnote 16: "the Hospital was growing <u>impatient</u> because while the negotiations proceeded, it continued to pay the salaries of the eight regular employees in the respiratory care department plus the fees that RTM charged for providing staff on a per diem basis". (Italic is provided). The ALJ formulates this conclusion by referring to **Jt. Exh. 43-B** but

¹ From now on to be referred as the "D & O".

focuses his analysis of this document only about a notification that Hospital issued to the Union about a proposal to withhold meal stipend payments (to which the Union opposed and the Hospital did not enforced). But the critical fact that also appeared on Jt. Exh. 43-B, about the notification to the Union of the deadline to reach an agreement on July 8th was avoided or missed by the ALJ. Therefore, after several postponements by the Hospital to undertake the subcontracting, the Union had been finally informed of the intention to proceed with the subcontracting by a given date. The Hospital had clearly informed the Union about the need to reach an agreement over the matter **no** later than July 8th or the institution would had to act unilaterally on the subject. The ALJ neglected to consider this important fact to define the impasse.

4- The evidence also shows that there had been several postponements by the Hospital for the subcontracting as the ALJ acknowledges in his decision. As the record shows the Hospital postponed the subcontracting decision from April 15 to April 30, 2011 (Jt. Exh. 22-B, third paragraph), postponed from April 30 to May 31, 2011 (Jt. Exh. 24-B), again from May 31 to June 30, and on June 20, 2011 up to July 1st (Jt. Exh. 35). In addition on July 1st the H.R. Director informed the Union for another postponement of the subcontracting (Jt. Exh. 41-B) to be extended several extra days (see: J. Exh. 43-b, third paragraph) and eventually up to July 8th, 2011. Hence the process to undertake the subcontracting decision was held for five (5) five times to allow the Union time to make analysis, provide proposals, etc.

5- As previously mentioned, the Union was aware since July 1st, and later on, that July 8th was the deadline to reach an agreement. Hence, when the Hospital Executive Director rejected in the afternoon (around 2:00 pm) of July 8th the Union's condition to consider the subcontracting, Respondent immediately notified the Union (by fax) about the rejection of the conditions and proceeded to notify the Respiratory Care employees about their employment termination. The evidence shows that once the respiratory care employees received their lay-off notifications some of them they remained waiting and pending for the last-ditch effort to be held between the Union and the Hospital in the afternoon of that same day July 8th. As Rodríguez testified at the hearing, some of these employees waited outside the meeting room expecting for the parties to over the impasse. She also testified that the Hospital was willing to reverse the lay-off that same day if the parties reached an agreement. When Union and the Hospital met again around 5:00 pm. of July 8th, evidence show that the impasse could not be overcome because the Union insisted on having the condition of the preferential shift and abandoned the negotiations. In order to understand the issue of the impasse the Board should analyze several factors that were interrelated within the process of the negotiations. The impasse was not an event that happened in July 8th. One of the most important matters to consider and understand how the impasse evolved in the case at bar are the following:

A- The Union's top officers previous statements that the subcontracting was not going to be accepted

- 1- The record of this case is clear and full of un-controverted evidence that the negotiations over the sub-contracting were doomed to fail since the Union Executive Director had categorically determined that no subcontracting was going to be allowed. This evidence was not considered by the ALJ. Nonetheless, Respondent provided evidence that at least in five (5) different occasions the Union President and its Executive Director made their position clear in advance that there was not going to be a subcontracting. For example;
- a) As **Jt. Exh. Exh. 5-B** unequivocally shows since <u>March, 24, 2011</u> the Union President had warned the Hospital for the <u>sub-contracting to be set aside or discarded</u>. Jt. Exh. 5-B clearly shows at page 3, second paragraph, that the Union's President stated "that *the privatization be left without effect* since it does not pay for the care that the employees have for the patients". The ALJ neglected to evaluate this document.
- b) As **Jt. Exh. 30-B** shows on <u>May 13, 2011</u> the Union President, again, demanded for the subcontracting to be discarded because according to the information provided <u>the privatization was not justified because the union did not saw savings</u>. Again, the ALJ neglected to consider this document.
- c) As **Jt. Exh. 31-B** shows on the negotiation meeting of <u>May 19, 2011</u> the Union Executive Director argued that the hospital's Human Resources Director ought to attend to a seminar that he went (about subcontracting) and that <u>the outsourcing shall</u> <u>be put aside</u>. <u>See</u>: Jt. Ehx. 31-B, page 3, fourth paragraph, seventh line). The ALJ Page 6 of 50

omitted to take into consideration previous union's statements during the negotiations that signaled that said negotiations were destined to fail.

d) One of the most important pieces of evidence of this case the bargaining minutes of

May 26, 2011 (Jt. Exh. 32-B), unequivocally demonstrates that the Union Executive

Director had sentenced, in May 26, 2011, that there was not going to be an

agreement over the subcontracting, since they (the Union) had participated in "seminars

on subcontracting and had written data and characteristics of a negotiation process to

source. That she (referring to Mrs. Meléndez, made Auxilio Mútuo Hospital pull back a

full privatization process". Thus, according to the Union Executive Director, and the

evidence shows..."the Hospital is buying an eternal controversy with the Union because

they will not agree what the Hospital will do regarding subcontract". (See: page 3,

bottom and page 4 top and second paragraph). Now it is extremely important to notice

that the General Counsel stipulated as correct these statements from the Union's

Executive Director. As the transcript of the hearing establishes the G.C. acquiesced to

these expressions. For example:

Page 257 L. 20 to 22: The G.C. states that "It is stipulated by the parties

that what is contained in the bargaining minutes

is what in fact happened during that meeting".

P. 258, L. 3 ALJ Carter: "Well, I'm not sure I understand your position. I

mean you went through a series of discussions many of which are supported by letters in these

by letters in these joint exhibits.

Mr. Oliveras: That's correct."

Then again the General Counsel restated on page 258, lines 15 to 20 of the transcription that the contents of the stipulated bargaining meetings are correct and he states and confirms that:

"Our stipulation was that each and every bargaining minutes for each of the meetings, bargaining meetings that are contained in the joint stipulation are *in fact what happened during that meeting,* so which is why we didn't go into the contents of those particular meetings because *they have been stipulated to*". (Italics are provided).

Then, according to the G.C. stipulation, the contents of Jt. Exh 32-B show the fact that the Union's Executive Director was opposed to the subcontracting and no agreement was going to be reached, ever. Moreover, according to Jt. Exh. 32-B the Union Executive Director sent a warning to the Chairman of the Board Directors of the Hospital that according to this union's officer there will be "no way" over the subcontract. See: Jt. Exh. 32-B at page 5, fifth paragraph, seventh line. This evidence that the ALJ did not considered show an attitude of bad faith from the union related to the negotiations and how these comments and behavior were tangent with the subcontracting negotiations outcome since the previous meetings. These comments were not stray remarks done by a union employee or a low level union officer, but by a top ranking officer that established the negotiation policy and strategy of the Union and a decision maker.

e) The only union officer that testified at the hearing, Mr. Ariel Echevarría, stated on a letter to the hospital's Human Resources Director dated May 9, 2011, that the Union's position was for the subcontracting to be left without effect. (See: J. Exh. 28-B). On the

other hand, according to **Jt. Exh. 40**, (second paragraph, last sentence, letter of E. Echevarría dated on July 1st, 2011 to Miss Candie Rodríguez)... "all negotiations meetings had been *unfruitful*") and restating for the subcontracting "to be left without effect". During his cross-examination of Ariel Echevarría, the G.C. principal witness, he acknowledged (at Tr. page 265 L. 11-13) that the minute recorded the Union's Executive Director that there was not going to be any agreement over the subcontracting. Therefore, the evidence shows that after three (3) months of negotiations Mr. Echevarría was also echoing the Union's president and the Executive Director position against the subcontracting. Accordingly, there is substantial evidence on the record over the Union's previous conduct not to look for a compromise and to forestall a bona fide impasse, but the ALJ overlooked this extremely important documentation.

B. Other Evidence Not Considered by the ALJ

1- It is of utmost importance to point that the ALJ judge opts to accept the Union's minute of the incidents of the afternoon of July 8th ("the Union's minutes are fully consistent with the facts recited here", see: D & O at page 12, footnote 23, second sentence), but the ALJ did not passed judgment over the testimony of the note-taking secretary of the Hospital (Mrs. Marisel Padilla) which, among other things, testified about; (1) the happening and confirmation of the impasse, (2) took notes for the hospital about that meeting, (3) that the Executive Director demanded and obtained for the Union representatives to leave the bargaining meeting in the afternoon of July 8th, Page 9 of 50

- (4) how the Union top officers behaved during the negotiation meeting and (5) the veracity of the expressions of the Hospital spoke-person (Rodríguez) during that meeting (expressions that the ALJ expressly discarded as discredited on his D & O at page 13, because Rodríguez supposedly "stretched the facts").
- 2- In addition, the ALJ discarded the Hospital's July 8th minute (see: Respondent's Exh. 4) for the Union's version (see: D & O at page 13) when there were two (2) representatives of Respondent (Rodríguez and Padilla) that confirmed and corroborated the contents of the Hospital's minute of the afternoon of July 8th.
- 3- The record is crystal clear: the union top officers were trained on how to defeat subcontracting negotiations to the extend that the Union President made another Hospital to drop or pull back a full privatization process. Equally, both union officers made direct comments during the negotiations that they were opposed to the subcontracting option. With these statements from the top ranking union officers the negotiation process was doomed to fail, there was no good faith bargaining from the top union officers, therefore, assuring for an impasse. Obviously, the ALJ neglected or avoided to consider the full meaning and impact of these expressions.
- 4- The ALJ stated that by the time that the Hospital issued the termination letters to the employees (around 2:00 p.m. of July 8th) the parties were not in an impasse. This determination is factually faulty. When the parties reached the apex of the negotiations on July 8th, 2011 the Union had conditioned previously the granting of the subcontract

to a series of terms, including a poison pill that the Hospital management was not going to accept. The impasse then had been configured and it became structured and blew in full when the Hospital Executive Director rejected the conditions. Put another way. The evidence shows that the Union had verbalized several times during the negotiation meetings that they were adamantly opposed to the subcontracting and due to this conduct the negotiations at the end became an exercise in futility. As the Union's Executive Director stated in the fifth meeting (May 26, Jt. Exh. 32) there was "no way" for the subcontracting. The ALJ failed to consider and weight the documentation (essentially the minutes of the negotiations developed before the July 8th meeting) that without any doubt demonstrated the Union's <u>subdued</u> strategy not to reach an agreement over the subcontracting.

The July 8th, 2011 meeting was critical to the case, at bar not only because what was discussed there and what was the parties position in that moment but also as to how and why the meeting ended. The ALJ decision states that "the meeting ended at 8:11 pm. without an agreement". At best this is an understatement. The testimonial and documentary evidence shows that the meeting ended not only in disagreement but also because the <u>Union left the negotiations</u>, after the Union president unequivocally voiced that the Union "had given all that had been asked for". See: **Respondent's Exh. 4**. The ALJ ruling omits these critical issues that denote that the impasse had been confirmed and where the Union conduct was restated. This exhibit showed what had been stated in advance by the Union Executive Director in the May 19 and 23, 2011 bargaining sessions that there was going to be no subcontracting.

5- Therefore, when the parties met in the afternoon of July 8th the impasse had exploded or became obvious when the Hospital's Executive Director that same afternoon flatly rejected the Union's condition, coupled with the previous overt expressions of the Executive Director of May 26, 2011 that there was not going to be a subcontracting. In the instant case we cannot separate these two situations. That afternoon meeting, as the ALJ recognizes, became "contentious", aggressive and the parties were openly airing what had been a non-verbalized deadlock through-out the negotiations: that the Union was opposed to the subcontracting. Then the Union walked-out of the negotiations confirming the impasse because of the rejection of the preferential shift condition stated at 2:00 p.m.

6- The ALJ states that "meaningful negotiations did not end that evening until the Hospital rejected the Union's offer to agree to reduce the monthly meal stipend to \$25.00 per employee if the Hospital accepted its condition that two employees be assigned to permanent shifts". This determination is factually incorrect. It is interesting to notice that when the Union requested the afternoon (5:00 p.m.) meeting, the Hospital had already notified the Union (via fax) the management's rejection of the conditions that same afternoon. After receiving the Hospital's rejection by fax (around 2:00 pm.) the Union—aware of the rejection and the impasse—requested a meeting from the Hospital and it was granted. That is, when the Union attended the afternoon meeting it knew beforehand, and had confirmed around 2:00 or 3:00 pm, that the poison pill condition imposed by them in the morning meeting (the acceptance of a preferential

shift to the union delegate) had been rejected by the Hospital's Executive Director.

This condition was the lock of the impasse and had been put in place or activated by the rejection of the conditions.

- 7- The record (the documentary evidence and the witnesses) also shows that the situation in the afternoon meeting essentially evolved over the Union's reaffirmation of its demand for the Hospital to accept the condition (the poison pill) of granting a permanent shift to a delegate, further increasing the impasse. The documentary evidence (Respondent's 4) and the persons (Mrs. Marisel Padilla and C. Rodríguez) that witnessed that meeting confirmed that the Union's position was "no preferential shift, no deal". Since neither party was required to "make concessions or to yield any position fairly maintained in collective bargaining", *NLRB v. Blevins Popcorn*, 659 F. 2nd 1173, 1187 (D.C. Cir. 1981); "impasse is a recurring feature in the bargaining process." *Charles D. Bonano Linen Service v. NLRB* 454 U.S. 404, 412 (1982).
- 8- Therefore, when the parties met again at 5pm afternoon of July 18th each one was fully aware (since 2pm) of the impasse and arguably tried to overcome it, because the job tenure of eight (8) employees depended or was conditioned to the acceptance by the Hospital for a preferential shift to a union delegate. (The parties had agreed in principle for the Hospital to keep the eight union employees without having to resort to the subcontracting plus a reduction of \$30.00 in the food stipend for a group of union employees). When the Union insisted on the preferential shift—which the Hospital again rejected—the impasse was confirmed, since that situation really occurred previously,

when the Hospital rejected the condition the first time around 2:00 pm. The impasse did not occurred at the 5:00 p.m. meeting as the ALJ concluded, it openly exploded at that time, but it was "born" or established with the rejection of the condition shift around 2:00 pm. by the Hospital management of the poison pill placed by the Union at morning session. As previously argued, the impasse was confirmed in the 5:00 p.m. when each party <u>restated</u> their positions and was <u>sealed</u> when the Union left the meeting restating that there was no deal. <u>See</u>: D & O at page 12 second paragraph (finding 10).

9- Although the ALJ did not credited the H.R. Director statements that she advised the employees that they would return to work if the Union and the Hospital reached an agreement in the evening negotiations (see: page 11, footnote 19 of the D & O), the record shows (and the ALJ acknowledges) that the laid off employees of the Respiratory Care Dept. had been told to be on hold by the Hospital Human Resources Director to wait for the outcome of the afternoon meeting to overcome the impasse. These statements by this H.R. Director were considered to "stretched facts to bolster respondent's theory" by the ALJ and therefore tarnished, in the opinion of the judge, the H.R. Director credibility. But, why then the laid off employees remained waiting for the parties to meet and solve the impasse? Why these employees, who had been informed about the loss of their employment, opted to wait for the results of a meeting if it was not for hope or expectations that the decision could had changed if an agreement was eventually reached?

10- This communication from the Human Resources to the employees indeed happened because there is no reason for these employees to wait after they had been fired. But the ALJ neglected to consider these factors in his analysis, and questioned the H.R. Director credibility in this regard, because she had requested for the terminated employees to return any Hospital property when they were notified of their termination. (From a managerial perspective is logical to request to a terminated employee to turn over company property at the moment of his/her termination than to be after said termination looking for the employees to turn over the property). But the fact is that a termination protocol or procedure should not be the reason to discredit the H.R. Director testimony that she had informed the respiratory care employees to wait and see if an agreement could be reached in order to overcome an impasse.

Conclusion. There were a series of events voiced by the Union that forewarned before July 8th that this organization was not going to compromise over the subcontracting. The record is clear and the documentary evidence show, without any doubt, that those expressions were done several times during the negotiation process but were not weighted by the ALJ. Nor the G.C. produced at the hearing the two top ranking union officers to clarify their expressions as collected in the minutes of the meetings of May 19, 2011 (Jt. Exh. 31) and May 26 (Jt. Exh. 32). Hence, these union statements should had stand as evidence of a lack of good faith to compromise and given weight by the ALJ to define how the impasse developed, when it occurred and when it was confirmed.

According to Respondent the impasse began to <u>develop</u> when the Union's Executive Director flatly and unequivocally stated that there was not going to be subcontracting which in turn was substantiated with several confirming comments from the Union President for the subcontracting to be set aside. The impasse <u>occurred</u> when the Hospital Executive Director rejected on the afternoon of July 8th the Union's morning demands and was the impasse was <u>confirmed</u> when the parties met at 5:00 (or 5:30 pm) on July 8th to try overcome the rejection of the preferential shift demand of the Union.

When the Hospital rejected the Union conditions (around 2:00 pm.) respondent proceed with the employment termination because the Union had been duly informed in July 6th that the deadline to reach an agreement was July 8th. As the ALJ acknowledged after five (5) postponements and several months of negotiations Respondent had grown impatient and a final stand had to be taken. This deadline is fully documented in **Jt. Exh. 43-B**. What the parties tried to do on the afternoon meeting of July 8th, was to overcome the impasse (created by the conditions previously rejected by the Hospital that same afternoon), but it proved fruitless because the Union insisted on the poison pill (the granting of the preferential shift) and eventually abandoned the negotiations (a situation which the ALJ toned down as having *end*.). We will discuss the ALJ mistake next.

SECOND EXCEPTION

The Administrative Law Judge (ALJ) decision states that meaningful negotiations over the subcontracting did not end on July 8th, 2011 when the "meeting ended". See: **Decision and Order at page 19.**

Respondent's Base for the Exception

- 1- The meeting did not "ended" as such as the ALJ states in his D & O. The ALJ carefully worded his decision by stating that the negotiation meeting "ended" at 8:00 p.m. to somehow convey that said meeting ended either by common agreement by the parties or a in casual way, but this is not what the evidence demonstrates. As Respondent's witnesses (C. Rodríguez and M. Padilla) attest and the documentary evidence proof confirmed (Respondent's 4) the Union <u>abandoned</u> the negotiations because the Hospital was refusing to accept the Union's demand of grating a preferential shift.
- 2- The documentary evidence shows that negotiation meeting of the afternoon of July 8th was abruptly ended when the Union decided to <u>leave</u> said meeting by stating that there was <u>no agreement</u>. Thus confirming the impasse. With this conduct the Union was clearly "at the end of their rope", *Larsdale, Inc.,* 310 NLRB 1317, and that the parties had "<u>exhausted</u> the prospects of concluding an agreement". *Taft Broadcasting Co.,* 163 NLRB 475 at 478 (1967).

The evidence of how the Union left the negotiations and the expressions of the Union President not to reach an agreement were corroborated by the testimonies of Miss Candie Rodríguez, Mrs. Marisel Padilla (Tr. at page 357, L. 20-22) and Mr. Carlos Díaz, all who were present at the July 8th afternoon meeting. Nonetheless, the ALJ did not consider these testimonies.

Conclusion. Evidence also shows that since the negotiations began the Union was predisposed not to concede for the Hospital to subcontract, that the Union had previous intentions not to agree to subcontract, that it openly opposed to such cost-cutting option and included as a poison pill a condition for the Hospital not to reach an agreement over the subcontracting and that it the Union the party that abandoned the negotiations after confirming the impasse. See: Respondent's Exh. 4.

THIRD EXCEPTION

The ALJ determined that a general memorandum issued by the Human Resources Director had the impact to construe an improper work rule and thus violated Section (a) (1) of the Act. See: Decision and Order, page 15, third paragraph.

Respondent's Base for the Exception

- 1- The Supreme Court has long held that an employer may lawfully communicate with its employees via "carefully phrased" statements based on "objective facts". *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). In the case at bar that was precisely respondent did by informing employees that certain union delegate had engaged in a conduct of setting unrest among the Hospital employees by instigating fear that their employment would be the next to be lost if the Hospital prevailed in the subcontracting. This in turn cause for someone to place a threat note in the windshield of the car of Carlos Díaz, the Respiratory Care Supervisor who presented the option to subcontract the services of his department.
- 2- As **Jt. Exhs. 10-B and 11-B** demonstrate the Union and the Hospital proceeded to discuss this potentially dangerous situation in order to avoid workplace compliance and risks of physical harm. **Exh. 11-B** specifically identify a female union delegate (Evelyn Santa) as one of the persons engaged in the unrest scheme and also identified several persons that were the subjects to this union delegate improper conduct. As the documentary evidence shows Mrs. Santa engaged in a workplace conduct by informing other employees that they will be the next to loose their job if the subcontracting of the respiratory care services prevailed. The union delegate did not have evidence to sustain these gossips. Employee Sonia Santana was verbally abused and suffered a breakdown. In order to control the unrest and uncertainty campaign among the employees, the Hospital issued a memorandum informing, among other things, for employees to be careful in relation with their auto speed within the parking premises, clarifying the issue of the subcontracting and informing that there was an unrest Page 19 of 50

campaign from certain employees that was creating emotional stress among some employees. The communication requested for this type of conduct to be terminated and if someone else was affected by the unrest campaign to have the situation reported to the Human Resources Dept.

3- The ALJ determined that this memorandum was unlawful because it would reasonably be construed as a work rule that prohibited Section 7 activity. According to the ALJ the union's female delegate was engaging in protected union activity when she informed several duly identified employees that they were the next to loose their jobs if the subcontracting was ever attained. (Although collaterally this conduct additionally shows and confirm that the Union was not going ever to compromise on the subcontracting option.)

4- In this specific matter, the question was not that the union delegate spoke to the employees but that instead that she threatened several employees including one (Sonia Santana) that emotionally was affected. But most importantly, the General Counsel did not presented the female union delegate to testify in order to demonstrate what really was that person conveying. Nor did the G.C. provided testimony from any employee that might have been affected by the issued memorandum in its Sec. 7 rights or how a given employee (reasonable or otherwise) might interpret the Hospital's communication. Was the union female delegate conveying a rightful protected activity or was she engaging in intimidation or a bulling conduct against other employees? The evidence to prove this specific charge was solely the G.C. allegations.

5- Moreover, as the D & O shows at **footnote 24 (page 24)** the ALJ went a step a little further and assumed that "although not alleged in the complaint as a separate violation, I note that a reasonable employee would also interpret the Hospital's memorandum as encouraging employees to submit reports to the Hospital about the protected Union activities of their coworkers". Here the ALJ assume facts not in evidence.

Conclusion. Respondent's memorandum of March 31, 2011 (Jt. Exh. 12-B) did not violated the Act when it convey and informed the employees that the subcontracting option that was been considered affected only one department and this was due to economic considerations and no one other department was going to be involved.

FOUR EXCEPTION

The ALJ generally discarded respondent's Human Resources Director (H.R.D.) expressions as spoke-person during at the bargaining process.

The ALJ supports his credibility findings in four cases related to credibility determination. See: Decision and Order at page 8 (footnote 12), page 11 (footnote 19), page 13, second paragraph (Discussion and Analysis Part A, Credibility Findings.

Respondent's Base for the Exception

1- The ALJ did not credited Miss Candie Rodríguez testimony that the Hospital would consider alternatives in lieu of of subcontracting in the March 24 bargaining meeting (D & O at page 8, footnote 12); nor does the ALJ credited that Miss Rodriguez advised employees that they would return to work if the Union and the Hospital reached an agreement in the evening negotiations (D & O at page 19, footnote 19). The lack of credibility on this specific point was because Rodríguez allegedly did not documented any change in the status of the employees in the Hospital records (see: D & O, note 19) and because the terminated employees had to return their office keys and identification after been informed of their termination. The ALJ also determined that Rodríguez testimony lacked credibility because she provided testimony that "stretched the facts to bolster Respondent's theory of the case", see: D & O at page 13, second paragraph).

2- The ALJ supports his credibility findings in four cases related to credibility determination, primarily, *Daikichi Corp*, 335 NLRB 53 (2001), *Double D Construction Group*, 339 NLRB 303, *Shen Automotive Dealership Group*, 321 NLRB 586 and *Roosevelt Memorial Medical Center*, 348 NLRB 1016. Of these four cases, two of them, *Doulble D* and *Daikichi* do not support the ALJ legal reasoning. We explain.

In *Daikichi*, supra, the Board established that "nothing is more common in all kinds of judicial decisions than to believe some and not all of a witness' testimony". This legal statement is the foundation to support the ALJ's credibility determination of Respondent's Human Resouces Director (Rodríguez) by believing and rely in certain parts of her testimony but selectively discarding others.

- 3- Nonetheless, when this specific Board case (*Daikichi*) is analyzed, the case contents clarifies when there is a situation where demeanor is not determinative vis-a-vis when said demeanor indeed is determinative. (See: *Daikichi*, supra, at page 623, left column, second paragraph). According to *Daikichi* "where demeanor is not determinative, an administrative law judge properly may base credibility determinations on the weight of the respective evidence, established or admitted fact, inherent probabilities and reasonable inferences which may be drawn from the record as a whole". But, does this legal guideline applies when demeanor is determinative? When demeanor is determinative? Was Rodríguez's demeanor determinative for her credibility?
- 4- The answer to these questions are provided by *Shen Automative Dealership Group*, 321 LRB 82 (1996) in which *Daikichi* relies and the ALJ acknowledges). In *Shen* the Board states that deference to a ALJ credibility determinations will be "based on demeanor, referred as testimonial inferences". See: *Shen Automotive* at page 589, left column, last paragraph). Moreover, according to the Board in *Shen*, supra, citing *Peñasquitos Village v. NLRB*, 565 F 2nd 1074:

"All aspects of the witness's demeanor—including the expressions of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during examination, the modulation or pace of his speech and other non-verbal communication—may convince the observing trial judge that the witness is testifying truthfully or falsely". *Shen* at page 589.

5- But as *Shen* indicates it is only "where demeanor is *not* determinative, credibility may also be based on the weight of the evidence, established or admitted facts, inherent probabilities and reasonable inferences drawn from the record as a whole". Shen at page 589, citing Gold Standard Enterprises, 234 NLRB 618. On the other hand, in the case at bar the ALJ acknowledges that in a given moment the bargaining between the parties became "most contentious and disputed" (See: ALJ decision at page 13, Part A, second parragraph) where "witness credibility was pivotal". On the other hand, the other major player in negotiations, the Union President and spoke-person, did not testified at the hearing to compare and contrast witnesses demeanor. Therefore, in the case at bar where the parties engaged in a contentious negotiation over subcontracting and many statements and expressions were done, demeanor of the key persons involved in said negotiations was indeed critically determinative. credibility findings attach great weight... "insofar as they are based on demeanor". Standard Dry Wall, Inc., 91 NLRB 103 (1950) at page 545. Although, demeanor is "only one of the many factors by which credibility is tested" Standard Dry Wall, footnote 2.

According to Respondent a case will be determinative on demeanor when there is testimonial evidence, that is, when a witness quality and contents of his/her testimony depends on the "expressions of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during examination, the modulation or pace of his speech and other non-verbal communication—may convince the observing trial judge that the witness is testifying truthfully or falsely". *Shen* at page 589. Therefore, the

Daikichi standard was not proper legal standard to apply in the case at bar by the ALJ, since in the case at bar demeanor was indeed determinative.

6- On the other hand, if demeanor was not determinative to define the H.R. Director's credibility and the ALJ..."credited the testimony of the other witnesses that the parties presented because the testimony was presented in a forthright manner and was corroborated by other evidence (including the joint exhibits", (See: D & O at page 15, second paragraph), who were those other witnesses that the ALJ credited over the H.R. Director testimony? The record is clear that the General Counsel other witnesses were, primarily, Mr. Ariel Echevarría and secondarily Mr. José Cruz (Tr. 459-464) and Catherine Colón (Tr. 464-472). Evidence shows that these two last witnesses were submitted by the G.C. only for rebuttal purposes and even Mrs. Colón admitted that Rodríguez had informed that last effort meeting was going to be held with the Union at 5:00 pm. Although these witnesses' testimony was limited mainly as to the delivery of the termination letters in the afternoon of July 8th and the turn over of Hospital property by the employees there are instances that these two witnesses corroborated Rodríguez statements.

Therefore, the only witness that the G.C. relied to discredit the H.R. Director testimony was Mr. A. Echevarría. The record shows that Mr. Echevarría acknowledged that the Hospital position to reject the Union's preferential shift was <u>final</u>. He also accepted that the parties were in disagreement over the subcontracting. On the other hand, Echevarría testified that he held a private, "off-the-record" meeting with Rodríguez in a Page 25 of 50

local restaurant, confirmed receiving a series of letters from Rodríguez either replying to others generated by him or stating the Hospital position in a given issue. Echevarría also provided his interpretation of certain provisions of Union contract, discussed in detail about the figures and other information provided by the Hospital in response to union's requests, etc. Nevertheless, the record does not show how did Echevarría ever rebutted Rodríguez testimony, since generally both testimonies seem to concord or agree and the ALJ did not compared or identified the discrepancies between Echevarría's and Rodríguez testimonies. Thus, since Echevarría was the principal witness of the G.C. it is rather difficult to determine how the ALJ relied upon Echavarría's testimony to limit the credibility of Rodríguez.

7- It is important to highlight that the ALJ indicates that as to the events of July 8th Miss Rodríguez testimony over what happened in this meeting lacked credibility because she provided "testimony that *stretched the facts to bolster the respondent theory of the case*". Miss Rodríguez was the Hospital's spoke-person in the negotiations, drafted the minutes of the meetings, complied with all the information requests presented by the Union, among other things. Now, does this statement of the ALJ about "stretching the facts" meant that there were problems with Rodríguez conduct during the hearing? Did her cross-examination by the General Counsel and the Charging Party demonstrated that Rodríguez lied? It is important to notice that Miss Rodríguez offered her statements under oath and she was <u>subpoenaed</u> by the General Counsel to testify. Thus she had no option but to testify as requested by the General Counsel.

As the Board had stated in *Double D Construction*, supra, at page 305, second bottom of column..."In any case, the risk that a lie will be discovered and punished, and the moral stigma attached to lying, are surely greater *where sworn testimony, provided in the solemn atmosphere of a hearing room, is concerned.* There is no possibility, for example, that the judge and opposing litigant will be indifferent to the falsehood". Therefore, *Double D* is not the proper legal standard to apply to support the ALJ legal reasoning to about the discrediting of Rodríguez.

8- Miss Rodríguez credibility should not be penalized or questioned because arguably she "stretched the facts to bolster respondent theory of the case". Does stretching the facts to bolster respondent theory means that Miss Rodríguez lied to the judge or that she was evasive in her answers? (In this situation the ALJ would be making a testimonial inference, Peñasquitos v. NLRB, 565 F. 2nd 1074 at page 1078, to conclude that Rodríguez testimony was not reliable or trustworthy). Or did Miss Rodríguez testimony was controverted or rebutted by a General Counsel witness? The answer to both question is no. If Rodríguez credibility was diminished by an opposing witness, the only person that the General Counsel had available to face this task was Mr. Ariel Echevarría and the record does not shows that Echevarría achieved this task. The G.C. presented no other witness to challenge the scope and extent of Rodríguez testimony, although in the crucial July 8th bargaining session the Union had other witnesses.

9- If we are to consider the guidelines set by the Board in *Double D Const.*, supra, that to judge a witness credibility his/her testimony must be judged reliable *under all*Page 27 of 50

circumstances, (Double D at page 305), Rodríguez credibility must had been judged in relation to other <u>testimonial evidence</u> of the case. Put another way, <u>who were the G.C.</u> <u>witnesses that undermined Rodríguez's testimony in all circumstances</u> when, as ALJ acknowledges, "witness credibility...was pivotal in certain areas and in particular was relevant to the events of July 8, when the parties had most their contentious (and disputed) bargaining sessions"? (See: D & O at page 13, second paragraph).

10- The record shows that the key persons of the negotiations of the case at bar were: Mrs. Ana C. Meléndez (Union President and its spoke-person), Mr. Radamés Quiñones Aponte (the Union's Executive Director, Mr. Ariel Echevarría (union officer), Miss Candie Rodríguez (Respondent's spoke-person), Mr. Carlos Díaz (Respondent's supervisor), Mrs. Marisel Padilla (a managerial secretary enrolled to take notes during the July 8th meeting) and Mrs. Ivette Ramos, the Hospital's Finance Director. Of these seven (7) persons, the two top union officers did not testified at the hearing. The record shows that in the July 8th afternoon meeting there were present two (2) other respondent witnesses (M. Padilla and C. Díaz) that do corroborate Miss Rodríguez version of what happened on that afternoon meeting. Thus, leaving Echevarría as the only person for the G.C. to contradict or discredit Miss Rodríguez testimony concerning what happened in said meeting. (Two other G.C. witnesses testimonies were rather limited since they did not attended the negotiations and their testimony (rebuttal) was over how termination letters were delivered to the respiratory care employees and over what Rodríguez told them about been retained if the parties ever overcome the impasse). Therefore, the record of the instant case shows that the principal G.C.

witness to testify at the hearing to somehow contradict Rodríguez testimony about what happened during the bargaining negotiations was A. Echevarría. Nobody else.

11- When Double D, supra, is analyzed we found legal issues that are different with the case at bar. In *Double D* the Board reversed the ALJ finding with respect to a witness named Thomas Sánchez. The ALJ major reason to discredit Sanchez's testimony was because said witness used a false social security number to obtain employment, hence due to this only conduct the ALJ concluded that Sánchez testimony was unreliable or unacceptable because that witness has made false statements, that is, using a false social security number. When the Board reversed the ALJ finding it determined that the Board "has long willing to credit witnesses who made false statements on employment applications or unemployment, if their testimony can be judged reliable under all the circumstances". Double D at page 305, second column, first paragraph. The record does not show that the ALJ determined that Rodríguez lied in her testimony or that the General Counsel impeached her by demonstrating that she lied or falsely provided a given statement. It is interesting to notice that fn. 14 of Double D (page 305) provides the evidentiary guideline (under Rule 608 of FRE) to attack the credibility of a witness by permitting a court "the introduction of evidence of 'specific instances of conduct', if they are 'probative of truthfulness or untruthfulness". The record does not show that G.C. submitted evidence on this regard.

12- According to the ALJ Rodríguez testimony "lacked credibility because she provided testimony that stretched the facts to bolster the Respondent's theory of the case".

Page 29 of 50

Nonetheless, the ALJ overlooks that "Respondent's theory of the case" rests not only on Rodríguez testimony but also in documentary evidence admitted as joint exhibits, like for example, the minutes of the negotiations sessions and in the considerable letters exchanged between Rodríguez and the Union officers, primarily A. Echevarría. Therefore, Respondent's theory of the case rest and depend not only on the testimony of Rodríguez, M. Padilla and Carlos Díaz but also in the documentary evidence. To reduce Rodríguez credibility the ALJ states that he instead relied in the "testimony of other witnesses that the parties presented because the testimony was presented in a forthright manner and was corroborated by other evidence". But who were these other witnesses that the parties presented (namely by the General Counsel) whose testimony was presented in a "forthright manner" when the G.C. presented only one (1) major witness (Echevarría) and the Union principal players (the President and the Executive Director) did not testified? Did Echevaría testimony nullified the testimony of Respondent's four (4) witnesses²? On the other hand, the D & O does not show how the ALJ findings and credibility determinations were practiced and reached over Echevarría testimony to prevail over Rodríguez's and most important if there were substantial discrepancies in Rodríguez testimony and which were these substantial discrepancies.

13- On the other hand, if the ALJ discredited Rodríguez testimony about that she had "advised employees that they would return to work if the Union and the Hospital

² These four witnesses were Ivette Ramos, Marisel Padilla, Carlos Díaz and C. Rodríguez.

reached an agreement in the evening negotiations", how the Board's doctrine on *Double D. Construction*, supra, is harmonized when it has been stated not to discredit the testimony of a witness because said witness used a false social security number? In the case at bar the ALJ did not complied with the Board's guideline, as established in *Double D Const.*, supra, at page 306, left column, that "our point, rather, is that in assessing whether a witness is telling the truth in a Board proceeding, a *judge must take into account all the factors that bear on the credibility of the witness at the time of his testimony*". (Italics provided).

14- During the hearing of the case at bar, it was of utmost importance—the testimony of Mrs. Marisel Padilla, that was not controverted. Mrs Padilla testified that she saw when the Union Executive—Director determined to leave—the meeting and, most importantly, the Union's President testimony that there was going to be no agreement unless Respondent accepted the union's demand—to—grant—the—special 7:00 a.m.-3:00 p.m. preferential—shift to the union steward. Mrs. Padilla corroborated Miss Rodríguez testimony and also was instrumental to provide the notes for Rodríguez to draft the Hospital's minutes of the afternoon session of July 8th. No consideration whatsoever was given by the ALJ to the testimony of Mrs. Padilla.

4-A Specific exception over the ALJ determination over the contents of the minutes of July 8th

a- Another issue and specific exception that is raised is that the ALJ accepted the Union's version of the July 8th afternoon meeting (see: D & O at page 12 fn. 23) since the "Union's minutes are fully consistent with the facts recited here", but rejected Respondent's 4 which was drafted by the notes recorded by Mrs. Padilla. Nevertheless, Mrs. Padilla testified at the hearing, her testimony was not controverted and the notes were provided to the G.C. Mrs. Padilla's notes were central and used as the base by Miss C. Rodríguez to write the Hospital's version which in turn was sent to the Union. This had been the procedure during the negotiations with previous minutes which were submitted as joint exhibits by the parties in the case at bar. In this specific case of July 8th the Union did not accepted the Hospital's drafting and issued a separate Union's version. As the ALJ acknowledged in fn. 23 both versions had differences, although he found that such differences were not material for his analysis.

b- But there were indeed several differences between the two documents like, for example, how the meeting ended on July 8th (the Union's version do not registered how the meeting ended) although Mrs. Padilla testified—and registered in her notes—that she heard when the Union's Executive Director demanded for them to leave the negotiations, that Respondent had agreed to meet with the Union as last attempt to overcome the impasse. There are even critical differences between the minutes since the Hospital version registered the Union President stating that the Union has given all they has been asked for while the Union version skips this important statement and other statements of the Union President in that July 8th meeting. Also, as witness Carlos Díaz clarified at Tr. page 364, L. 12 to 22 there were discrepancies with the Union's

version of the July 8th minute. Nor the Union's version was consistent with facts recited by the ALJ in his D & O. Why the ALJ opted to accept the Union's version of the minute over the Hospital's while the person who registered the notes for the Hospital's version testified in accordance to the its version and not cross-examined is not supported by the facts.

Conclusion. In regard to any major G.C. witness challenging Miss Rodríguez credibility, there is no one. The only testimonial evidence that the General Counsel offered to bolster or support its case was Mr. Ariel Echevarría isolated testimony but the record does not shows, nor the ALJ points or identifies any statements made by Mr. Echevarría, to contradict or rebut Miss Rodríguez's testimony. The other two (2) remaining witnesses presented by the General Counsel were Mr. José Cruz and Mrs. Katherine Colón which were used as rebuttal witnesses, but as the record shows they were witnesses whose testimonies was limited to the moment in which they received their termination letters in the afternoon of July 8th, 2011. The transcript show that this witness alleged that Rodríguez did had a meeting with him where she only informed him about his employment termination and told him nothing more. Nevertheless, this witness alleged that his meeting with Rodríguez lasted 35 minutes (Tr. page page 462, L. 2) which is rather a lengthy time for only to convey a termination statement. But during his cross-examination even this witnesses (Mr. Cruz) acknowledged that he had been previously aware of the disagreement between his Union and the Hospital over the subcontracting. There is no preponderance of the evidence in the record for the ALJ to discard Rodríguez testimony as unreliable, untruthful or evasive. On the contrary,

there is in the record corroborative evidence, documentary and testimonial, that supports and validates Rodríguez statements through-out the hearing. The G.C. did not provided rebuttal evidence (other than the limited testimonies of two witnesses—J. Cruz and K. Colón)---to challenge or disparage Rodríguez testimony.

FIFTH EXCEPTION

The ALJ determined that "the Hospital did not presented any credible evidence that its decision to subcontract with RTM to provide *per diem* employees was supported by an established past practice", therefore, respondent's reliance in *Westinghouse Electric Corp.* 150 NLRB 1574 was inappropriate. See: Decision & Order at page 17, last paragraph and page 17, footnote 27, second paragraph.

Respondent's Base for the Position

1- The record clearly and unequivocally shows that the Hospital had an on going practice to hire *per diem* employees for its Respiratory Care Dept. since 2006, that is long before before using Respiratory Therapy Management (RTM) services in 2011. Although the ALJ correctly defines past practice as an event that "occurred with such regularity and frequency that employees could reasonable expect the practice to continue or reccur on a regular and consistent basis", see: D & O at page 16, first paragraph, he incorrectly determined the facts and somehow missed the corresponding Page 34 of 50

evidence submitted to prove this matter. The ALJ omitted to consider on this issue **Jt**.

Exh. 52-A ³ where a list details the use of fifteen (15) per diem employees by the Hospital since November 2006, that is, for a period of five (5) years before the occurrence of the case at bar.

2- The ALJ also states "there was no pre-existing procedure or practice for hiring the per diem employees that RTM provided (under the collective bargaining agreement or otherwise), the Hospital's decision to subcontract with RTM was a new development (borne out of the Hospital's January 2011 plan to subcontract the entire respiratory therapy department, rather than the product of a past practice". See: <u>D & O at page 17</u>, second paragraph. In addition the ALJ determined that "the Hospital did not present any credible evidence that its decision to subcontract with RTM to provide per diem employees was *supported by an established past practice*. The decision in Westinghouse is therefore inapposite". (Italics are provided).

3- Respondent respectfully rejects this specific ruling since the documentary evidence does proves that there was indeed a past practice. **Jt. Exh. 52-A** shows that in the Respiratory Care Dept. alone <u>per diem employees had been hired since 2006</u>. What was modified in said past practice was that Respondent opted to have a private

³ This Jt. Exh. 52-A should not be mixed or confused with another one (GC-2) that shows the *per diem* employees hired from RTM since March 28, 2011. See: Attachments provided with hard or paper copy.

company (Respiratory Therapy Management) to hire and supply the *per diem* employees rather than Respondent continuing doing the hiring directly.

Nevertheless, the practice *per se* continued as it had been done since 2006 at least for the Respiratory Care Dept. although as Tr. page 84, L. 1-11 show, the H.R. Director asserted that this practice of hiring *per diem* employees had been in place since 1997. In this specific finding the ALJ either omitted to consider Jt. Exh. 52 or was wrong when applying the past practice concept that he defined.

4- In addition, on May 10, 2011 the Hospital informed the Union that the private provider of respiratory care services would be providing *per diem* employees "to cover the absences related to vacations, sickness, waivers and licenses until it is finished the process of lay-off and/or negotiations and the cost it is said in the contract". But according to the Hospital the complete services of the provider were to be performed once the negotiation process was finished. See: Jt. Exh. 29-B, item 1. Since Respondent was the party that bear the burden of proof to show the past practice of hiring *per diem* employees by the Hospital, Jt. Exh. 52 show that this past practice had been used at least since 2006 for the Respiratory Care Dept. On the other hand, Respondent's Exh. 2 demonstrated that indeed there was such past practice throughout the different department of the Hospital before 2006, in some cases dating back to 1991.

<u>Conclusion</u>. The record clearly shows that since 2006 Respondent did have a past practice to use *per diem* employees to cover service needs in the Respiratory Care Page **36** of **50**

Dept. Additionally, this past practice to resort to *use per diem* employees was applied in other unionized clinical departments as **Resp. Exh. 2** demonstrates. The ALJ overlooked or did not considered or analyzed these three (3) documents. Respondent did not violated the Act when it hired *per diem* employees according to a past practice established, in the case of the Respiratory Care Dept, since 2006. Therefore, Respondent's reliance in *Westinghouse Electric Corp.* 150 NLRB 1574 was indeed appropriate legal standard to support its position on this matter.

SIXTH EXCEPTION

The ALJ did not made specific determinations as to the testimonies of Mrs. Marisel Padilla and Mrs. Ivette Ramos as the probative value of these witnesses was important to show credibility of the Hospital's main witness (Miss Candie Rodríguez) as well as respondent's financial problems to consider subcontracting to help to reduce its operational costs. (No identification of a given part of the decision can be offered since there were no determinations performed by the ALJ).

Respondent's Base for the Exception

1- In the case of Mrs. Marisel Padilla this witness' participation in the afternoon meeting of July 8th, 2011 is critical to, among other things, (a) corroborate the Human Resources Director credibility about the the confirmation of the impasse, (b) the Page 37 of 50

expressions of the Union President that there was not going to be an agreement (c) and the Union's abandonment of the negotiation that day, among others. Mrs. Padilla testimony was not controverted either by the Charging Party or the General Counsel. Nonetheless, no determination was performed in this matter by the ALJ.

2- In the case of Mrs. Ivette Ramos, the Hospital's Finance Director, this person testified at hearing of the case and offered evidence about Respondent's financial problems and the efforts of the Hospital to communicate to the Union during the bargaining sessions about certain problems facing the hospital. These problems included the decrease of the patient census and the need use to resort to cost-effective options and use of a Full Time Equivalent to maximize resources. In relation to the Hospital economic hardship, Mrs. Ramos testified how much money Respondent had been losing, the need to have some savings or reductions in costs and how the situation was explained to the Union as **Jt. Exh. 31-B and 32-B** confirms.

3- The ALJ determined that there was "no evidence that the Hospital faced an extraordinary and unforeseen occurrence that required immediate action", see: D & O at page 20, last paragraph of f/n 18. Although respondent did not claimed the unforeseen factor it did presented, through the testimony of the Finance Director, the extraordinary factor since the Hospital had lost over 20 million dollars over several years. (See: Tr. at page 330, L. 22-24). Due to this serious financial situation the Hospital needed to undertake cost-savings measures. The ALJ did not passed judgment over the

testimony of Mrs. Ramos and concluded that the Hospital had no evidence it has facing economic problems.

SEVENTH EXCEPTION

The ALJ recommends the issuance of a broad order arguably because allegedly Respondent has engaged in a repetitive activity to violate the Act. See: Decision and Order at page 22.

Respondent Base for the Exception

1- The ALJ recommendation for a broad order is unsustainable in fact. The ALJ bases his decision in respondent having been found in violation in two (2) cases, that is, case 24-CA-11438 and 24-CA-11630. Of these two cases, case 11438 has been complied partially by Respondent by paying employees what was due to them, restating the practices that were modified (like granting half-holidays instead of full consolidated holidays and the corresponding accrual of holidays when such time fell in the employees' day off. Nonetheless, the Board has moved for enforcement over a discrepancy as how the deciding ALJ understood the remedy in relation to an accrual benefit. According to Respondent the collective bargaining agreement the remedy that was supposed to be provided was to accrue the benefit and not to pay employees in cash for said accrual as the ALJ ruled. The union contract does not provide for such remedy.

2- The other case that the ALJ refers in the case at bar (11630) is still before the Board since exceptions were done to this case. Respondent argues that the Board should allow for Respondent to be granted the <u>due process right to be heard in the review process</u> that has been petitioned in case 11630 and not to use these two cases to support the issuance of a broad order.

EIGHT EXCEPTION

Adverse Inference: Request for an Specific Exception. The ALJ refused to find an adverse inference over the non appearance of the Union's President and the Executive Director. See: Decision and Order, page 12.

1- Since the G.C. did not produced the Union's President nor the Executive Director to rebut at the hearing their statements as collected in the documentary evidence previously indicated (Minutes contents May 19 (Jt. Exh. 31), May 26 (Jt. Exh. 32) and July 8th (Respondent's 4) an adverse inference should have been granted by the ALJ to confirm the expressions of union officers in that occasions. The ALJ refused to consider this inference. (see: D & O at page 12, footnote 23). The ALJ argued that the adverse inference was unwarranted because material facts were largely undisputed and were established by other reliable evidence. But the adverse inference ruling was a most since the expressions of the two ranking union officers had demonstrated their unwillingness not to accept the subcontracting, which in turn had a impact in the

configuration of the impasse. An <u>specific exception</u> and finding should be considered by the Board on this critical aspect that there was not a good faith legitimate attitude of the Union to reach an agreement over the subcontracting and thus an impasse did happened in the case at bar, specially when the documentary evidence—accepted as joint exhibits—show the statements proffered by the two top ranking union officers claiming that the subcontracting was unacceptable for them and should be discarded by Respondent.

2- To support this adverse inference request Respondent resorts to one case used by the ALJ to based the legal reasoning of his decision. The legal reference is *Roosevelt Memorial Medical Center and American Federation*, 348 NLRB 64 although this case does not support the ALJ legal reasoning in the instant case. But when a contents analysis is done in this case it is found that the Board states at page 1023 that:

"Normally it is within an administrative law judge's discretion to draw an inference based on a party's failure to call a witness who may reasonably be assumed to be favorably disposed to the party and who could reasonably by expected to corroborate its version of events, particularly when that witness is the party's agent and thus within its authority or control. It is usually fair to assume that the party failed to call such a witness because it believed that the witness would have testified adversely to the party". *Automated Business Machines*, 285 NLRB 1122, 1123. (Case citation is from Roosevelt Memorial).

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The absence of the Union's Executive Director from testifying is telling because the end result of the negotiations were influenced and were determined by his statements, as shown and confirmed by the stipulated documentary evidence and witnesses testimonies, that there was going to be no subcontracting. Therefore, the G.C. and the Charging party failure to call to testify the two principal witnesses of the Union's negotiation team allowed for the ALJ to make an adverse inference. A party's failure to explain why it did not call the witness may support drawing the adverse inference. *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15, see: fn 15.

NINTH EXCEPTION

The ALJ determined that after the July 8th meeting the Union sent to Respondent on July 18th a communication in response to an H.R. Director letter and providing a model work schedule for the Respiratory Care Dept. and requesting further dialogue about these issues. See: **D & O at page** 12, Point 11, second paragraph.

Respondent's base for this Exception

When reaching credibility determinations using this union token attempt, the ALJ failed to consider and analyze that Respondent provided the testimony of Mr. Carlos Diaz to provide his analysis over the Union's proposed work schedule model. This Page 42 of 50

work schedule was an attachment sent in a letter of July 18, 2012 and it was accepted for its authenticity. Díaz testified at the hearing that he had analyzed said work schedule developed by the Union President but Díaz found it technically faulty since the program did not met real operational needs and staffing requirements of the Respiratory Care Dept. According to Díaz, the work schedule as developed by the Union president had, among other things, been prepared without considering certain events and incidents that usually happened in his department like sick absences, increased services needs, no-show no-call absences, and union contract provisions like a limit in grave-yard shifts, etc. Moreover, this work schedule had been prepared by the Union President who did not testified at the hearing of the case at bar. Therefore, the ALJ considered in his and credibility findings over a document that had been challenged and impeached at the hearing by Respondent's department supervisor, while the person that drafted said document did not testified. In relation to the Union's offer to renew the negotiations this was an empty, token gesture, Cotter & Co., 331 NLRB 94 (2000), since the Union did not proffered alternatives nor it did notified that was willing to modify its position over the preferential shift or made counter-proposals.

CONCLUSION

A- In the case at bar the ALJ overlooked important and crucial documentation that demonstrated Respondent's effort to negotiate over the subcontracting of the services of its Respiratory Care Dept.

B- The ALJ denied credibility to the Hospital's H.R. Director but not based on testimonial impeachment, witness demeanor, evasiveness or untruthful conduct. If there were discrepancies in the testimony of Respondent's Human Resouces Director, the ALJ did not ruled if those discrepancies were <u>substantial</u>, *Pan v. González*, 489 F. 3rd 80, 1st Cir. 2007 (thus affecting the truth).

C- The ALJ neglected to make determinations of facts over the testimonies of Respondent's witnesses Marisel Padilla and Ivette Ramos. In the case of M. Padilla the facts determinations were pivotal to confirm the Hospital H.R. Director (Rodríguez) testimony at the hearing, primarily over the contents of the controversial July 8th afternoon meeting, what was discussed, how the meeting ended and the confirmation of the impasse, among other things.

D- If after the Union Executive Director categorically sentenced that there was not going to be an agreement over the subcontracting and the Union President in several occasions requested for the subcontracting to be set aside but the parties continued bargaining, it was because Respondent was complying with Act by meeting with the Union, providing information over the subject as requested and engaging in a meaningful bargaining. (As the original Complaint states the G.C. argued that respondent supposedly did not provided timely notification to the Union (it did) and did not engaged in a meaningful negotiation (evidence proved it also complied with this requirement of law).

E- Nonetheless, the bargaining procedure turned to be a union ruse and strategy to stall

the negotiations to eventually block any result by demanding an unacceptable condition.

After several postponements to proceed with the subcontracting, Respondent opted to

notify the Union about a final deadline to either reach a compromise over the matter or

to proceed with the subcontracting.

F- The Union finally torpedoed the negotiations and had them fail by inserting the

unacceptable condition. This unacceptable condition was in the form of a poison pill

demanding for the Hospital to accept granting an special preferential, guaranteed shift

to one union delegate (over other respiratory care employees) since this union steward

already had a permanent 3:00 pm. to 11:00 pm shift (see: Tr. page 234, L-22). The

record shows that the negotiations were sentenced to fail by the documented,

consistent statements from the union top officers not to compromise over the

subcontracting.

G- The present case was not decided upon the preponderance of the evidence and

accordingly, the Decision and Order of the instant case should be reversed.

Respectfully submitted this 29th day of February, 2012, in San Juan, P.R.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief has been filed at NLRB Region 24 offices at La Torre de Plaza Building, Suite 1002, Tenth Floor, 525 F.D. Roosevelt Ave., San Juan, P.R. 00918. I also certify that a copy has been sent via regular mail to the union's attorney, Mr. Harold Hopkins at P.O. Box 362905, San Juan, P.R. 00936-2904.

Respectfully submitted by certified mail number **7010-2780-0000-5630-5066** to the Office of the Executive Secretary of the National Labor Relations Board, at 1099 14th Street, N.W., Washington, D.C. 20570. This document has also been electronically filed at the N.L.R.B.

Respectfully submitted this 29th of February, 2012 in San Juan, P.R.

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